

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2021

To be submitted

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-2021

UNITED STATES OF AMERICA,
Respondent-Appellee,

—v.—

KENNETH L. BROWN,
Petitioner-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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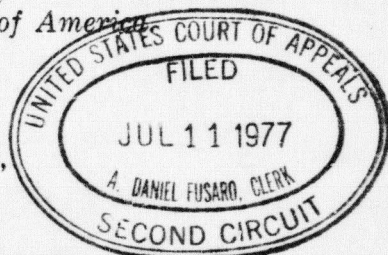


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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Kenneth Brown appeals from an order entered on December 21, 1976, in the United States District Court for the Southern District of New York, by the Honorable Gerard L. Goettel, United States District Judge, denying without a hearing his motion for post-conviction relief, pursuant to Title 28, United States Code, Section 2255.

Indictment 76 Cr. 476, filed May 13, 1976, charged Brown and Eric Daniels, Don Daniels, Sylvia Diaz and Patricia Booth Cornwall in Count One with conspiracy to commit an armed robbery of United States Postal employees and conspiracy to possess blank, stolen United States Postal Money Orders with intent to convert them to their own purposes, in violation of Title 18, United States Code, Section 371. Count Two of the indictment charged all of the defendants with robbery of United States Postal Employees, in violation of Title 18, United States Code, Section 2114. Count Three charged all de-

fendants with putting the lives of postal employees in jeopardy by use of firearms, during the robbery charged in Count Two, in violation of Title 18, United States Code, Section 2114. Count Four charged each of the defendants with possession of stolen, blank United States money orders with intent to convert them to their own use, in violation of Title 18, United States Code, Section 500. Counts Two, Three and Four additionally charged the defendants with aiding and abetting the commission of the crimes charged in those counts, Title 18, United States Code, Section 2.

On June 21, 1976, trial commenced for defendants Brown, Eric Daniels, and Don Daniels, and on June 29, 1976, they were convicted on all four counts. Defendant Patricia Booth Cornwall pleaded guilty to Count One of the indictment on June 23, 1976. Defendant Sylvia Diaz pleaded guilty to Count Four of the indictment on October 19, 1976.

On September 21, 1976, Brown and his co-defendants, Eric Daniels and Don Daniels, were each sentenced to three years' imprisonment on Count One, twenty-five years' imprisonment on Counts Two and Three, execution of sentence suspended; and five years' imprisonment on Count Four, to run consecutively to the three years imposed under Count One. Brown and his co-defendants are currently serving their sentences.*

On March 11, 1977, this Court affirmed the convictions of Brown and Eric Daniels without opinion. Don Daniels did not pursue an appeal.

* On October 20, 1976, Judge Goettel suspended imposition of Cornwall's sentence and placed her on unsupervised probation for one day.

On November 23, 1976, the District Court suspended imposition of Diaz' sentence and placed her on probation for two years.

On October 28, 1976, during the pendency of his direct appeal, Brown filed a motion pursuant to Title 18, United States Code, Section 2255, seeking post-conviction relief on various grounds. The District Court found all of the claims to be meritless and denied the motion.

Statement of Facts

For a full statement of the facts in this case, the Government respectfully refers the Court to the Government's brief in that appeal at pp. 3-13 (Docket No. 76-1453).

1. The Trial

At about 7:50 A.M. on Saturday, May 1, 1976, the petitioner, Kenneth Brown, and two others, Eric Daniels and Don Daniels, robbed the Hellgate Station of the United States Post Office, located at 153 East 110th Street. During the robbery, they looted the Post Office of 1,004 domestic money orders, a money order machine, the plates needed to write up the money orders, and seven Post Office boxes and a ledger used to record sold money orders. (Tr. 373, 320, 321, 328, 332, 332-36, 373, 381; GX 8, 97, 124, 123, 1A, 1B, 1C, 1D, 1E, 1F, 1G, 52 and 52a-52d).^{*} The Government's evidence at trial consisted of the testimony of an admitted participant in some of the acts, one Patricia Cornwall, as well as testimony of others in whom the defendants confided in making their plans to rob the station. In addition, the Government's evidence included many of the stolen items recovered from an apartment used by the defendant. Also found in that

^{*} Citations to "Tr." refer to pages in the trial transcript; "GX" refers to the Government's Exhibits; and "H" refers to the transcript of the pretrial suppression hearing on June 21, 1976.

apartment were numerous pieces of evidence demonstrating the complicity of each of the defendants including Brown.

The robbery of the Post Office was accomplished with the use of a rifle (GX 2) and a hand gun (GX 3; Tr. 151, 203, 229, 232). The robbers herded the postal employees into the vault and shut the inside gate of the vault, and carried the proceeds of their robbery in two army-type duffle bags. (GX 1; Tr. 154, 206, 152, 208, 280). After cutting the telephone wires outside the vault, (Tr. 233), the robbers left the Post Office. Shortly thereafter, at about 8:00 A.M., the manager of the Hellgate Station Post Office came down to the vault floor and found the employees locked in the vault. Subsequently, the manager took a survey and determined that the aforementioned items were missing.

Preparation for the robbery took place during the week before the robbery. Patricia Booth Cornwall, who was an employee of the Hellgate Station Post Office from May 1969 to May 1976, lived in an apartment at 1295 Fifth Avenue with Don Daniels. Through Don Daniels she met "Cardine," who was later identified as Kenneth Brown, and she met Eric Daniels, who lived with Sylvia Diaz in the apartment next door. (Tr. 475-86).

On April 27, 1976, the Tuesday before the Saturday, May 1, robbery of the Post Office, Don Daniels asked Cornwall to tell him what valuables were kept in the Post Office, where the money orders were stored, and what security was maintained. (Tr. 488-89). After she told him that there was no regular guard on the weekend, he said that he was thinking of robbing the Post Office. The next day, at the request of Don Daniels, Cornwall drew diagrams of the outside of the Post Office (Tr. 502-04; GX 26A-26C), of the floor plan of the inside (GX 27A-27D;; Tr. 510-14, 521-23), and of the walk-in vault at Hellgate station (Tr. 517-18; GX 27A-

27D). On the evening of the following day, Don Daniels and Cornwall met with Eric Daniels and went over the diagrams. Eric Daniels then said he was going to call "Cardine". Upon completion of the phone call, Eric advised Don and Cornwall, "Okay, Cardine's in on the robbery and we have our own artillery." (Tr. 538-39).

On Friday evening, Don Daniels left the apartment at 1295 Fifth Avenue and came back with "Cardine," a/k/a Kenneth Brown. (Tr. 547-49). Brown arrived with a black case, took out an automatic pistol and showed it to Don Daniels. (Tr. 548-49; GX 3, 93). Don then showed Brown the diagrams of the Post Office and discussed them with him. (Tr. 550-51). Taking the diagrams with them, Brown and Don Daniels then left; Don Daniels stated that they wanted to look around the Post Office (Tr. 552). When Don Daniels returned, he gave Cornwall a piece of paper with a phone number on it and told her to call that number after she got to work in the morning and found that the safe had been opened. (Tr. 552-53). On Saturday, May 1, Cornwall, when she saw that the vault was open, called the phone number as arranged. (Tr. 553-55). The robbery took place immediately thereafter.

On the day before the robbery, Friday, April 30, 1976, between 6:00 P.M. and 8:30 P.M., an individual by the name of Katherine Stubbington, who was assisting Eric Daniels in the formation of a health foods business, called Eric Daniels. Eric requested that Stubbington get herself some false identification because he was going to come into possession of government checks very soon. (Tr. 1007-09, 1011). While pretending to go along with the scheme, Stubbington instead called Postal Inspectors, who pursued the lead and ultimately effected the arrests of the robbers and their accomplices.

2. The Present Petition

On October 28, 1976, during the pendency of his direct appeal, Brown filed a petition seeking post-conviction relief under 28 U.S.C. § 2255. In the District Court, several claims were raised, only some of which are pursued upon this appeal. On this appeal, three claims are presented: (1) that there was no probable cause for Brown's arrest; (2) that a forcible entry into Brown's apartment in pursuit of an accomplice, Sylvia Diaz, was illegal; and (3) that an unconstitutional search and seizure took place while Postal Inspectors were safeguarding Brown's apartment until a search warrant for the premises was issued.

Judge Goettel denied relief with respect to each claim raised by Brown. In denying relief with respect to the three matters raised by Brown on this appeal, the District Court found: "The first two grounds, unlawful arrest and unconstitutional and illegal search and seizure, were the subject of a pretrial motion to suppress which was denied." The Court further stated: "No new facts are brought forth and there is no reason for reconsidering the earlier determination." 76 Civ. 4774, Mem. Op. at 1 (Dec. 21, 1976).

ARGUMENT

POINT I

Brown's Failure to Raise His Present Claims on Direct Appeal Forecloses Assertion of Them on a Petition Under 28 U.S.C. § 2255.

The claims that Brown now asserts in his motion pursuant to 28 U.S.C. § 2255 were, as the District Court found in its order denying the motion below, fully litigated at a pretrial suppression hearing. These issues

were again raised at the trial. They were not, however, raised on Brown's direct appeal, where he was represented by his trial counsel. The determination to pursue other issues on direct appeal while omitting any mention of the present claims can only be seen as a deliberate bypass which forecloses assertion of these claims on a collateral attack of the conviction. It is settled law that a deliberate bypass of appellate review of an available issue bars its assertion under section 2255, even if the claim is a constitutional one. *Kaufman v. United States*, 394 U.S. 217, 227 n.8 (1969); *United States v. West*, 494 F.2d 1314 (2d Cir.), cert. denied, 419 U.S. 899 (1974); *Zovluck v. United States*, 448 F.2d 339 (2d Cir. 1971), cert. denied, 405 U.S. 1043 (1972). See also *Wainwright v. Sykes*, 45 U.S.L.W. 4807 (U.S., June 23, 1977); *Davis v. United States*, 411 U.S. 233, 239-42 (1973).

In the present case, the inference is compelling that Brown deliberately avoided direct appellate review of the issues presented by this motion. Brown's present motion rests exclusively on matters presented for decision to the trial court. As the District Court found in denying this motion, "[n]o new facts are brought forth . . ." in connection with this motion. Brown and his trial counsel—who continued to represent him on appeal—were in a position to press these issues on direct appeal if either believed there was any merit to them. Assertion of these claims on this motion is no less than an abuse of the federal habeas corpus remedy.*

* Although the Supreme Court in *Kaufman v. United States*, *supra*, 394 U.S. at 228, expressed significant and grave reasons for liberal invocation of habeas corpus relief where constitutional claims are at stake, Brown's motion betrays those valuable considerations and is no less an imposition on this Court. His motion offered no explanation or excuse for the failure to have pursued these now belated claims on earlier available occasions. Invocation of habeas relief on such frivolous constitutional

[Footnote continued on following page]

POINT II**There Was Probable Cause for the Arrest of Brown When He Left the Apartment and Entered the Car.**

Although the merits of this appeal need not be reached, examination of the three claims reveals them to be frivolous. Brown's first claim is that there was no probable cause for his arrest when he emerged from the apartment at 22 West 121st Street. This argument is absurd.

The events leading up to Brown's arrest were as follows: At about 10:00 A.M. on May 1, 1976, Postal Inspector Monroe had received a telephone call from his base advising that there had been a robbery at the Hellgate Station Post Office. Monroe went to the Hellgate Station at 153 East 110th Street and assisted in the investigation of the robbery. (H. 46-47).

At about 11:30 A.M. on the same morning of the robbery, Katherine Stubbington received a telephone call from Eric Daniels, who told her:

"I got it, I have it. It's all in front of me. I got everything, I got a code book, I've got the ledgers and you don't have to worry about it. They won't even know it's gone until Monday. These are United States government checks. They are United States postal money orders . . ." (Tr. 1010).

claims warrants application of the deliberate bypass doctrine here, consistent with the important policy considerations which limit the availability of collateral attack generally. See *United States v. Sobell*, 314 F.2d 314, 324-25 (2d Cir.), cert. denied, 374 U.S. 857 (1963).

Eric again asked her, as he had the night before to obtain false identification. He told her that the money orders would be made up in denominations of \$300.00 and that they would go from department store to department store that afternoon working in teams. The agreement was that Stubbington would purchase something and whatever she bought she would get to keep and would make \$100.00 for each money order. (Tr. 1010-11).

After speaking with Eric Daniels, Stubbington called the Postal Inspection Service and later received a telephone call from Postal Inspector Mackin. After speaking with Inspector Mackin, Stubbington attempted to call Eric Daniels back at the same number she had called the night before. Stubbington was advised by Don Daniels that Eric Daniels was not there but that he would be right back. Stubbington told Don to tell Eric when he got back that she got "it", to which Don Daniels replied "Dynamite."

Ten or fifteen minutes later, Stubbington called back and this time spoke with Eric, who gave her directions to 22 West 121st Street near Lenox Avenue, advising her that he was in a basement apartment at that address and that she should knock on the window or ring the bell. Stubbington then called Inspector Mackin and told him that the arrangements had been made. Forty-five minutes later she was picked up by Postal Inspectors Monroe and Upthegrove. (Tr. 1010-15).

Monroe took Stubbington to the Bronx Post Office where Stubbington again called Eric Daniels with Monroe listening on an extension phone. Stubbington advised Eric that she had someone who could provide false identifications. Eric then gave Stubbington descriptions of three people. (Tr. 1015-16). Eric told Stubbington to bring her friend along and that he, Eric, would throw the friend a "couple of hundred." (Tr. 1015). Eric

Daniels then told Stubbington to come to 22 West 121st Street. (H. 61),.

At about 3:30 P.M. to 4:00 P.M., Monroe and Stubbington took a cab to the brownstone house located at 22 West 121st Street. Stubbington knocked on the basement window as instructed. Someone held the curtain back and then Kenneth Brown, who introduced himself as "Gene," came to the inner gate and opened that gate. (H. 48, 62-63). Monroe was introduced to Brown, Brown looked at Monroe and Stubbington, and then said "Come on in". (H. 63-64).

In the apartment were three persons: Kenneth Brown, Don Daniels, and Sylvia Diaz. Sylvia Diaz took Monroe's coat and ran her hands up and down Monroe's sides. Inside the apartment, Monroe saw postal money orders stacked on a coffee table in front of the couch, some of which were enclosed in Post Office wrappers. In addition, Monroe observed a postal money order machine and a green duffle bag which was full of something unknown. (H. 49-51, 67). Stubbington picked up a money order and handed it to Monroe and asked Monroe if he could make one. Monroe observed that the money order was from the same series of money orders taken during the robbery earlier that day. (H. 52-53, 58-59).

Monroe then showed a certificate of title for a car to Kenneth Brown, who jumped up and down asking Monroe if he could make one for a Mercedes Benz. (Tr. 1019). Kenneth Brown further inquired as to the possibility of using such documents to open a line of credit. (Tr. 1020). Kenneth Brown and Don Daniels gave descriptions of themselves to Monroe and Stubbington, with Brown requesting more than one set. Brown and Don Daniels told Monroe that they did not have to worry about being paid for the identification since Eric would take care of it.

Upon leaving the apartment at 22 West 121st Street after approximately fifteen minutes, Postal Inspector Monroe advised fellow Postal Inspectors and police who were on surveillance outside the apartment of the description of those on the inside of the apartment—Brown, Don Daniels and Sylvia Diaz—and additionally gave them a description of the stolen property he had seen inside. Monroe then went to the United States Attorney's Office to obtain a search warrant for the apartment. (Tr. 729-20; H. 53-54).

At approximately 5:21 P.M., Kenneth Brown, Don Daniels and Eric Daniels left the apartment and were arrested by Postal Inspectors and police who had been on surveillance outside the apartment. (Tr. 831).

A Postal Inspector or police officer may arrest without a warrant one believed by him upon reasonable cause to have been guilty of a felony. *United States v. Watson*, 423 U.S. 411, 417 (1976); *Carroll v. United States*, 267 U.S. 132, 156 (1925). By the time of Brown's arrest, the arresting officers had information imparted to them by Monroe, identifying Brown as one of the individuals in possession of the money orders and other items stolen from the post office. In addition, Monroe had personally conversed with Brown about his desire to obtain false identification. At this point, the officers not only had probable cause to believe that Brown was guilty of a felony, they had already gathered a *prima facie* case against him. The validity of his arrest cannot be seriously contested when it is measured against the applicable case law. See, e.g., *United States v. Santana*, 427 U.S. 38, 40-41 (1976); *United States v. Rueda*, 549 F.2d 365 (2d Cir. 1977).

POINT III

The Entry into the Apartment by the Postal Inspectors and the Police Was Proper.

Brown's second contention is that the forcible entry into his apartment by the Postal Inspectors and the police in pursuit of Sylvia Diaz was illegal. This contention is without substance.

At approximately 5:25 P.M., subsequent to the arrest of Brown and Don and Eric Daniels, the Postal Inspectors and police who were outside 22 West 121st Street approached the basement apartment, and one of the police officers knocked on the window. Someone opened a louver blind or shutter from inside the apartment and quickly shut it. The police and the agents waited for approximately one minute and, when there was no response, broke into the apartment. (H. 106; Tr. 896). The apartment was searched for Sylvia Diaz, and it was discovered that she had left through another door and had gone upstairs to another apartment. (Tr. 1092-93). Monroe subsequently obtained the search warrant at about 9:00 P.M., and returned to the apartment, which was being safeguarded by fellow Postal Inspectors. (Tr. 730).

Forcible entries without an announcement of authority and purpose have been approved in situations in which such an announcement would be a useless gesture or in which there is a danger of flight, destruction of evidence, or harm to the officers. See, e.g., *United States v. Manning*, 448 F.2d 992, 1000-02 (2d Cir.), (en banc), cert. denied, 404 U.S. 995 (1971); *United States v. Nicholas*, 319 F.2d 697, 698 (2d Cir.), cert. denied, 375 U.S. 933 (1963); *United States v. West*, 328 F.2d 16 (2d Cir. 1964); *United States v. Wylie*, 462 F.2d 1178 (D.C. Cir.

1972); *Masiello v. United States*, 317 F.2d 121 (D.C. Cir. 1963).*

The information received by the officers from Monroe was sufficient to give them adequate basis for a reasonable belief that Diaz was in the apartment. See, e.g., *United States v. Rueda*, *supra*. Monroe had provided the officers with descriptions of one female and two males as being the persons he had seen in the apartment. After the return of a third male (Eric Daniels) to the apartment, three males were arrested after they emerged from the apartment. The one female had not come out of the apartment. (H. 105-06).

The closing of the blind at the sight of the officers and the failure to respond within a reasonable time—after the officers waited approximately one minute—constituted a recognition of the officers and a refusal of admittance. See, e.g., *United States v. West*, *supra*. In addition, the danger of flight by Diaz became paramount; and there were also dangers that the evidence the officers knew to be in the apartment might be destroyed and that the officers might be harmed upon entry. (Tr. 1093). At that point, the officers acted properly in entering the apartment forcibly. *United States v. Mejias*, 552 F.2d 435, 445 (2d Cir. 1977); *United States v. James*, 528 F.2d

* The pertinent statute, not cited by Brown, is 18 U.S.C. § 3109:

"The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

This statute has been referred to in situations, such as the present, in which the officers are acting without a warrant, *United States v. Manning*, *supra*, and in which the officers are seeking to execute an arrest, *United States v. Phillips*, 497 F.2d 1131 (9th Cir. 1974).

999, 1017 (5th Cir. 1976); *United States v. Allende*, 486 F.2d 1351, 1353 (9th Cir. 1973).*

Even though this entry was entirely proper, assuming *arguendo* that it had not been proper, Brown would have no grounds for complaint. His arrest did not result from this entry, nor was there any evidence seized as a consequence of this entry. The search warrant, pursuant to which the evidence in the apartment was seized, was being sought at the time of this entry and Monroe's affidavit in support of the search warrant was based solely on what he had seen in the apartment on his earlier visit. (H. 57, 76-78, 88-89). Accordingly, the officer's entry into the apartment could not possibly be a ground for overturning Brown's conviction.

POINT IV

Postal Inspectors Properly Safeguarded the Apartment Until the Search Warrant Was Issued.

Brown's third argument is that an unconstitutional search and seizure took place while Postal Inspectors were safeguarding the apartment until a search warrant for the premises was obtained. This claim is also frivolous.

After entering the apartment, the Postal Inspectors and the police searched the apartment for Sylvia Diaz, who had left through another door. (Tr. 1092-93). Surveillance agents had not, however, seen her leave the building. (Tr. 1093). Postal Inspectors remained inside the apartment from that time, approximately 5:25 P.M., until approximately 9:15 P.M. when Monroe returned to

* It is of no consequence that Sylvia Diaz was not found in the apartment. *United States v. James*, *supra* at 1017; *United States v. Hofman*, 488 F.2d 287 (5th Cir. 1974).

the house with a search warrant to conduct the search. (H. 54, 68).

During this period the Postal Inspectors merely safeguarded the apartment.* Thus, other than searching for Sylvia Diaz, neither a search of the apartment for evidence nor a seizure of evidence took place while the officers were inside the apartment. (H. 102, 107, 110, Tr. 730).**

Moreover, as to the safeguarding of the evidence while waiting for the search warrant, this is precisely the course of action that is recommended in situations in which law enforcement officers, desirous of making a search, have no warrant and there is a danger that the evidence will be destroyed or removed if left unguarded. See, e.g., *Chambers v. Maroney*, 399 U.S. 42, 51-52 (1970); *Coolidge v. New Hampshire*, 403 U.S. 443, 460-61 (1971); *United States v. Rodriguez*, 532 F.2d 834, 839 (2d Cir. 1976). See also *Chimel v. California*, 395 U.S. 752, 773-75 (1969); *United States v. Mejias*, *supra*

* Once inside the apartment to search for Sylvia Diaz, the officers could properly have seized relevant articles in plain view, *Harris v. United States*, 390 U.S. 234 (1968) (per curiam); *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971); *United States v. James*, *supra*, at 1017, but they did not do so. (H. 102, 107). Certain of the fruits of the crime were in plain view. (H. 107-08).

** While Monroe was at the United States Attorney's Office preparing the search warrant, a phone call was received from one of the agents who was inside the apartment following the arrests. Monroe received no information from the agents present as to what they saw and his affidavit for the search warrant was based solely on what he had seen in the apartment on his first visit at 3:30 P.M. to 5:00 P.M. (H. 76-78, 88-89). Monroe recalled that the Assistant United States Attorney who had received the call from the agents in the apartment had told the agents not to touch anything until Monroe arrived with the search warrant. (H. 94-95).

at 444. Such a danger was certainly present, particularly since Sylvia Diaz was in the apartment building and had access to the apartment. In this situation, the agents acted quite properly.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
County of New York)

Kenneth V. Handal being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District of
New York.

That on the 11th day of July, 1977
he served a copy of the within Brief for United States of America
by placing the same in a properly postpaid franked
envelope addressed:

KENNETH L. BROWN
Lewisburg Federal Penitentiary
Lewisburg, Pennsylvania

And deponent further says that he ~~sealed the said en-~~
velope and placed the same in the mail ~~drop for~~
~~mailing~~ at the United States Courthouse, Foley
Square, Borough of Manhattan, City of New York.

Kenneth V. Handal

Sworn to before me this

11th day of July, 1977

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1979

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